

Memorandum 2015-36

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Public Comment

The Commission has received a number of new communications relating to its study of the relationship between mediation confidentiality and attorney malpractice and other misconduct.¹ Those communications are attached as follows:

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|-------------------------------------------------------------------------------------|-------------------|
| | <i>Exhibit p.</i> |
| • William Gwire, Bruce Glassner & Lisa Battista, Gwire Law Offices, (6/22/15) | 1 |
| • Ron Kelly, Berkeley (7/24/15) | 8 |
| • Nancy Neal Yeend (7/28/15)..... | 12 |

To assist the Commission in considering the new communication from Ron Kelly, the following document is also attached:

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|-----------------------------------------------------------------------------------|-------------------|
| | <i>Exhibit p.</i> |
| • Conference of California Bar Associations, Proposed Resolution 09-03-2015 | 10 |

This memorandum discusses the new communications listed above. Before turning to them, however, we briefly explain the status of the materials that Patrick Evans submitted when the Commission met in June.

MATERIALS FROM PATRICK J. EVANS

At the June meeting, attorney Patrick Evans informed the Commission about a mediation experience involving some of his clients, which resulted in litigation that is now pending on appeal. He submitted a thick binder of materials, which consists of a 3-page letter to the Commission, numerous publicly filed documents

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

relating to the pending case, transcripts of proceedings in that case, and a deposition transcript from the same case.

The staff has since reviewed the materials, but has not yet determined the best means of presenting them to the Commission, without running afoul of any legal constraints that might (or might not) apply. We will discuss those materials in a supplement to this memorandum, or in a memorandum for the next Commission meeting, as time permits. In the meantime, we wish to thank Mr. Evans for the time and effort he took to submit the materials to the Commission.

COMMENTS OF GWIRE LAW OFFICES

Gwire Law Offices is a 3-attorney firm in Emeryville. For the past 25 years, the firm has almost exclusively “represented clients in legal malpractice, overbilling, and ethics claims against their former lawyers.”² According to the firm, it has “more than enough business than [it] can handle, and accept[s] only one to two percent of the cases that are presented to [it].”³

The firm submitted a 7-page letter to the Commission, signed by all three of its attorneys.⁴ They “are big proponents of mediation” and believe that the protection for mediation communications “is undoubtedly a significant factor contributing to the utility of mediation”⁵ They “do not advocate its eradication,” but they do urge the Commission to create a new exception to California’s mediation confidentiality statutes, to address attorney wrongdoing in mediation:

We write in support of a legislative retreat from the holding of *Cassel v. Superior Court ...*, 51 Cal.4th 113 (2011), which confirms that California’s statutory mediation privilege extends to all communications between an attorney and client during the mediation process. We believe the mediation privilege has become an unfair shield for some lawyers against legitimate claims for malpractice, breach of fiduciary duty and other claims that clients would otherwise have against their attorneys. We encourage the Law Revision Committee to recommend the creation of an exception to the mediation privilege that allows for the admissibility of attorney-client communications occurring during mediation in support of a cause of action for legal malpractice, breach of fiduciary duty, or other such wrongdoing.⁶

2. Exhibit p. 1.

3. Exhibit p. 3.

4. *Id.* at 1-7.

5. *Id.* at 2.

6. *Id.* at 1 (footnote omitted).

The attorneys estimate that about 50-150 potential clients contact the firm each year “about attorney conduct issues or communications that occurred during a mediation.”⁷ The firm does not keep statistics on the types of mediation issues that trigger the calls, but its attorneys estimate that “one-third of them involve statements, representations or promises made by the client’s attorney that have turned out to be untrue, induced the client to settle based on false promises, or involved the admission or discovery of malpractice, incompetence, or other wrongdoing.”⁸ The attorneys say the firm has declined “many compelling malpractice and fiduciary breach claims on the sole basis that the wrongdoing occurred during mediation,” and thus “the mediation privilege blocks these clients from exposing the misconduct and, potentially, any remedy.”⁹ They regard this “one of the most tragic and morally wrong things we face in our practice.”

The Gwire attorneys then (1) provide a list of reasons why they believe the volume of mediation-related attorney wrongdoing is sufficient to warrant creation of a new exception to mediation confidentiality,¹⁰ (2) explain that the stiff standards for a legal malpractice case make it unlikely that such an exception “will lead to an avalanche of lawsuits filed by people who are suffering from nothing more than ‘settler’s remorse,’”¹¹ (3) describe two mediation confidentiality test cases they handled,¹² and (4) provide a “sampling of situations described ... by potential clients whose lawyers made negligent or intentional misrepresentations at mediation upon which the client relied in agreeing to settle”¹³

In their opinion, “[t]he bottom line is that because of the mediation privilege, mediation has the potential of becoming an ‘ethics-free zone’ — a black hole from which evidence of legal malpractice, fraud and other actionable conduct cannot escape.”¹⁴ They “strongly encourage the Law Revision Committee to recommend an exception to the mediation privilege for attorney-client communications that may give rise to causes of action for attorney misconduct.”¹⁵ “In this respect, [they] believe that California should align its

7. *Id.* at 1-2.

8. *Id.* at 2.

9. *Id.*

10. *Id.* at 2-3.

11. *Id.* at 3-4.

12. *Id.* at 4-5.

13. *Id.* at 5-6.

14. *Id.* at 6.

15. *Id.* at 7.

position on mediation confidentiality along the lines of what is provided in The Uniform Mediation Act, approved in 2003, and now adopted or closely followed in approximately 16 states.”¹⁶

COMMENTS OF RON KELLY

Mediator Ron Kelly wrote to provide an update on the status of a proposal pending before the Conference of California Bar Associations (“CCBA”).¹⁷ In that proposal, the Bar Association of San Francisco urges CCBA to adopt a resolution (Resolution 09-03-2015) seeking enactment of legislation that would amend one of the mediation confidentiality provisions (Evidence Code Section 1120) to “create an exception to the mediation privilege, for communications between spouses or [registered domestic partners] that constitute a fraudulent breach of fiduciary duty.”¹⁸ A copy of the proposal is attached for convenient reference.¹⁹ According to the proponent,

While the mediation privilege promotes an important public policy, guarding against one spouse/RDP inducing the other to settle a dissolution case through the use of false, misleading, or fraudulent information is also an important public policy. This resolution seeks to balance these policies, by providing that when a breach of fiduciary duty that rises to a fraud (violation of Civil Code Section 3294) occurs in family law mediation, the spouse who was harmed by that can present evidence about the breach to the court.²⁰

CCBA will consider the proposal at a meeting later this year.

Mr. Kelly reports that the proposed resolution “has generated significant opposition from family law mediators and collaborative law practitioners around the state.”²¹ He also reports, however, that the proposal has “catalyzed a widespread consensus among family mediators on the need to amend 1120 to codify the Lappe decision referenced in Ms. Gaal’s April 2, 2015 memo, and a further consensus on the wording of such an amendment.”²² He has provided

16. The Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws) initially approved the Uniform Mediation Act in 2001, and amended it to address international commercial mediation in 2003. The Act has been adopted in eleven states and the District of Columbia. See Memorandum 2014-14; Memorandum 2014-24.

17. Exhibit pp. 8-9.

18. Exhibit p. 10.

19. *Id.* at 10-11.

20. *Id.* at 10.

21. Exhibit p. 8.

22. *Id.*

the text of the proposed amendment that has apparently gained such consensus.²³

The proposed CCBA resolution and the alternative proposal described by Mr. Kelly relate to interplay between the mediation confidentiality statutes and the financial disclosure requirements applicable in certain family law cases. These proposals stem from concern over a string of appellate decisions that involved alleged misdeeds by a mediation *party* in a marital dissolution proceeding.²⁴

As explained in Memorandum 2015-34, the Commission's current study has a different focus: the relationship between mediation confidentiality and alleged *attorney* misconduct in a *professional capacity in the mediation process*. The family law issue described above is receiving ample attention from other people and organizations. There is no need for the Commission to get involved in it.

Further, it is not the Commission's role to weigh in on, or otherwise interfere with, legislative proposals being prepared or advanced by others. In fact, Government Code Section 8288 provides:

8288. No employee of the commission and no member appointed by the Governor shall, with respect to any proposed legislation concerning matters assigned to the commission for study pursuant to Section 8293, advocate the passage or defeat of the legislation by the Legislature or the approval or veto of the legislation by the Governor or appear before any committee of the Legislature as to such matters unless requested to do so by the committee or its chairperson. In no event shall an employee or member of the commission appointed by the Governor advocate the passage or defeat of any legislation or the approval or veto of any legislation by the Governor, in his or her official capacity as an employee or member.

Thus, "[t]he Commission does not take position on bills; it speaks to the Legislature through its own recommendations and bills."²⁵

The staff therefore **strongly recommends that the Commission stay out of this battle, but continue to monitor it.** If there is eventually a bill implementing a Commission recommendation in this study, and that bill would amend a code section that is also the subject of another bill, the staff is well-familiar with the

23. *Id.* at 10-11.

24. See *Lappe v. Superior Court*, 232 Cal. App. 4th 774, 181 Cal. Rptr. 3d 510 (2014); *In re Marriage of Woolsey*, 220 Cal. App. 4th 881, 163 Cal. Rptr. 3d 551 (2013); *In re Kieturakis*, 138 Cal. App. 4th 567, 41 Cal. Rptr. 3d 119 (2006). For discussion of these cases, see Memorandum 2015-4, pp. 19-20, 23-24, 37.

25. Memorandum 99-85, p. 2.

process of preparing appropriate amendments to coordinate the two bills and preserve their effects upon enactment.

COMMENTS OF NANCY YEEND

Mediator Nancy Yeend submitted a letter sharing her thoughts on Memorandum 2015-35, relating to scholarly literature on mediation confidentiality.²⁶ She makes a number of different comments, including the following:

- “As the Commission notes in its memorandum, predictability is a very important concept ... For this reason, mediators who glibly say, *‘What happens in mediation — stays in mediation.’* may be misleading participants. Their paraphrasing of this current Las Vegas marketing slogan does not define mediation, does not address exceptions, and certainly does not make clear that presently both attorney and mediator malpractice is protected.”²⁷
- “[H]and-[w]ringers’ and ‘naysayers’ have no evidence that creating exceptions to report or defend claims of professional misconduct and/or malpractice have weakened the process.” She points to experience in other states, most notably Florida.²⁸
- “Some say use an *in camera* process; however this procedure takes time and is expensive.”²⁹
- “Bar associations are in an ideal position to deal with claims against attorneys. For mediators, who are not attorneys, the courts are presently the only option. Creating a true credentialing entity would be superior.”³⁰ Credentialing would enhance public confidence in mediation, because “[m]aking mediation a true profession, and not continuing as a cottage industry, would mean that mediators would actually have to take training, subscribe to a code of ethics, understand the statutes that relate to the practice, acquire continuing education, and be of good moral character.”³¹
- The “elephant in the room” is “*What will happen to mediation when the public becomes aware that court decisions have protected malpractice?*”³²
- Another significant issue is: “*Who has the legal or ethical duty to inform the participants that both attorney and mediator malpractice is protected?*”³³

26. Exhibit pp. 12-14.

27. *Id.* at 12 (emphasis in original).

28. *Id.* (emphasis in original).

29. *Id.*

30. *Id.*

31. *Id.* at 13.

32. *Id.* (emphasis in original).

- There is “speculation that if exceptions are created to the confidentiality statute, then there will be a flood of requests to rescind settlements. What the empirical evidence actually shows is that there is no flood.”³⁴
- “Impartiality is as much a cornerstone of mediation as confidentiality. When settling the case, at all costs, trumps impartially managing the process, then it is time to create an exception to confidentiality.”³⁵
- With regard to “good faith” participation in mediation, “few ever define ‘good faith.’ Before a rule is credible, the terms need to be clearly defined.”³⁶
- “Criminal activity (past, present or future), abuse (children and elders) and neglect are not topics that should be concealed by the umbrella of mediation confidentiality.”³⁷
- “If people are signing confidentiality agreements when they participate in mediation, and yet they have no understanding of what it means or the implications, how can this be informed consent?”³⁸
- Phyllis Bernard “makes a strong case for self-represented litigants to have support” — i.e., the right to have an attorney or support person attend the mediation.³⁹
- “ADA cases mediated for the Justice Department provide a ‘reasonable’ period of time before the settlement becomes binding. Many jurisdictions and various contracts provide ‘72-hour kick-out’ clauses. Mediated settlements enjoy a significantly high compliance rate. When people question the settlements they have signed, it typically is based on intimidation, coercion or just being rushed. Skilled mediators will schedule a ‘back-up’ mediation session, so in the event someone has been pressured, there is a time and place designated to re-negotiate. Competent mediators possess the skills to effectively manage the process in a way that prevents many of these issues from ever arising.”⁴⁰

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

33. *Id.* (emphasis in original).

34. *Id.*

35. *Id.*

36. *Id.* at 14 (emphasis in original).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* (emphasis in original).



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June 22, 2015

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Re: Relationship Between Mediation Confidentiality and
Attorney Malpractice and Other Misconduct, Study K-402

Dear Ms. Gaal and Members of the Committee:

We write in support of a legislative retreat from the holding of *Cassel v. Superior Court (Wasserman, Comden, Casselman & Pearson, L.L.P.)*, 51 Cal.4th 113 (2011), which confirms that California's statutory mediation privilege extends to all communications between an attorney and client during the mediation process.¹ We believe the mediation privilege has become an unfair shield for some lawyers against legitimate claims for malpractice, breach of fiduciary duty and other claims that clients would otherwise have against their attorneys. We encourage the Law Revision Committee to recommend the creation of an exception to the mediation privilege that allows for the admissibility of attorney-client communications occurring during mediation in support of a cause of action for legal malpractice, breach of fiduciary duty, or other such wrongdoing.

We are a law firm, currently three full-time lawyers. For the last 25 years, on an almost exclusive basis, we have represented clients in legal malpractice, overbilling, and ethics claims against their former lawyers. We do not do any defense work.

Each year for at least the last five years, our firm has received inquiries from approximately 1,000 to 1,500 potential clients who suspect they may have been wronged by their attorneys. Perhaps five to ten percent of those potential clients (50 to 150 per year) contact us about attorney conduct issues or communications that occurred during a

¹ Cal. Evid. Code § 1119 makes confidential and inadmissible in a later proceeding all communications made "for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation." For the sake of brevity, we refer to such communications as communications made "during mediation" or "during the mediation process."

mediation. While we do not keep any statistics on the types of mediation issues that trigger the calls, we estimate that one-third of them involve statements, representations or promises made by the client's attorney that have turned out to be untrue, induced the client to settle based on false promises, or involved the admission or discovery of malpractice, incompetence, or other wrongdoing. If this type of attorney misconduct had occurred in any setting other than mediation, the client would have legal recourse. But because the wrongdoing occurred during a mediation, the mediation privilege blocks these clients from exposing the misconduct and, potentially, any remedy. We submit that this "mediation immunity" is simply wrong and that the creation of an exception to the mediation privilege is justified and needed.

We want to make clear that we are big proponents of mediation. It is our preferred method of formal dispute resolution. We mediate virtually every case that does not settle informally, and we have enjoyed excellent results from mediation. The privilege is undoubtedly a significant factor contributing to the utility of mediation, and we do not advocate its eradication.

But we have had to decline too many compelling malpractice and fiduciary breach claims on the sole basis that the wrongdoing occurred during mediation. Indeed, turning away clients who have otherwise viable cases based on attorney negligence and false representations because the law has tied our (and their) hands is one of the most tragic and morally wrong things we face in our practice. We are aware of the comments submitted to you by many (if not most) mediators and many lawyers who oppose any exception to the privilege and claim that the problem of malpractice at mediation is not prevalent *enough* to justify weakening the privilege. We challenge that argument for many reasons. Here, in no particular order of importance, is a list of the reasons we believe that the argument that the problem is not *that* serious is without merit:

- We don't think the mediators (or the agencies providing the mediators) are talking to the people with whom we are talking.
- We are unaware of any effort by the large and recognized mediation providers to keep accurate (or, for that matter, any) records of post-mediation problems that clients have with their lawyers.
- Mediators are not always present when an attorney reveals malpractice (e.g., "I lost the evidence," or "I failed to designate experts"), makes false promises to induce settlement ("I'll reduce my fees if you agree to settle"), or engages in other wrongdoing.
- Even when the mediator is present, he or she may not recognize a particular communication as wrongdoing (e.g., an attorney's false claim to have compromised liens on the file), or may not feel it is his or her place to comment on the admission. (We wonder how many mediators who witness malpractice actually inform the client).

- The malpractice or other wrongdoing often does not occur until after the formal mediation process has ended (e.g., a lawyer later reneges on a promise made during mediation).
- As long as the mediation privilege remains absolute, with no exceptions, it will be difficult if not impossible to accumulate empirical data on the frequency of malpractice occurring during or in the course of mediation.
- Even when a mediator witnesses misconduct short of a crime, the mediation privilege forecloses him or her from revealing it to others.
- Finally, we submit that even *one* occasion of a lawyer cheating a client by lying or revealing wrongdoing at mediation is too much to tolerate.

The mediation privilege has compelled us to turn away almost all of these people at the initial interview stage, even when we believe that malpractice or other wrongdoing has likely occurred. We expect that there are cynics who will say that our advocating for an exception to the mediation privilege is simply a way for us to get more business. That is not true. Unfortunately for the profession, we have more than enough business than we can handle, and accept only one to two percent of the cases that are presented to us. We have downsized from as many as seven lawyers solely because we did not want to handle a large volume of cases. Our purpose here is simple: The people who talk to us about their unfortunate situations have to be told they have no remedy or recourse. We are the ones who have to explain to them that the law has given their attorneys a license to lie to them during a process they have been told would help them. They don't understand why the mediation privilege extends to these situations and protects these lawyers. Nor do we.

The number of people with whom we speak, as noted above, may not seem large but we are just one small firm; undoubtedly, other lawyers and firms receive similar inquiries. And, of course, many clients simply don't make any attempt to contact an attorney to seek recourse for these wrongs.

Some proponents of keeping the mediation privilege exception-free argue that the creation of a legal malpractice exception will lead to an avalanche of lawsuits filed by people who are suffering from nothing more than "settler's remorse." We don't think so. Experienced legal malpractice lawyers quickly separate clients with legitimate claims from those who are merely disgruntled with the terms of a valid settlement. The claim that "my lawyer pressured me to settle against my will," without more, usually does not pass muster, and the economic and evidentiary burdens of bringing such claims are an

inherent and serious deterrent.² The courts have little to fear if such claims are allowed through the mediation privilege net. And, as most malpractice lawyers understand, trying to sue a lawyer solely on the ground that the settlement was not large (or small) enough is extraordinarily difficult as the client must not only prove there was malpractice in the case, not only overcome the “case within the case” proximate cause hurdle, but also prove that the disputed settlement was not even “in the ballpark” based on a good faith determination of relative liabilities. See *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*, 38 Cal.3d 488 (1985).

Of course there is the possibility that some non-meritorious claims will be pursued if the exception we are advocating is created. But our focus should be on the meritorious claims that are currently barred but could go forward if an exception were created.

We feel so strongly about the injustice of the mediation privilege as presently construed that we have taken on a few cases in the hope that one of them might serve as a test case for piercing the privilege and challenging what we believe amounts to a free pass for some lawyers to breach their ethical and fiduciary duties to their clients.

Indeed, we believe a conflict arises every time a case is taken to mediation, and pits the lawyer’s knowledge of the insulating effect of the mediation privilege against the lawyer’s fiduciary duty to affirmatively disclose all material information to the client, including that the client may not rely upon any representations made by the lawyer at the mediation because the representation, promise or statement cannot be used in any subsequent proceeding.³ We don’t understand how or why the lawyer’s fiduciary duties should be suspended immediately before, and especially during the mediation process, or on what pseudo-fiction the law relies to explain away this apparent conflict.

² We leave for another day the question of whether clients settling at a mediation should be given a three-day window to reject a settlement reached at a mediation. We hear many horror stories about clients being pressured to settle at marathon mediations where they sense their own lawyers have turned against them, they have no opportunity to leave or seek independent counsel, and they are worn down by the haranguing and other pressure tactics that are put on them (i.e., “if you don’t settle, I’m going to get out of this case,” which seems to be a very popular threat). The description of these intense efforts to close a settlement sound like the worst stories of extreme car sale tactics, made all the worse because car salespeople don’t owe customers any fiduciary duties.

³ We hesitate to comment on whether the disclosure of this conflict needs to be in writing, signed off by the client and coupled with a disclosure that the client has the right to seek independent counsel, with the time to do so.

As it happens, your committee is already familiar with one of our cases. As you stated in Memorandum 2015-22 and its First Supplement, a lawyer persuaded his reluctant client to accept a settlement at mediation by agreeing to compromise his fee. They even put their agreement in writing, albeit not in the settlement agreement between the parties to the mediation. When the settlement check was delivered to the attorney's office, he endorsed his client's name on the check without her knowledge and took for himself his original uncompromised fee, later claiming that the client coerced *him* during mediation to agree to an unfair fee compromise. In the hope that the case might make it to the appellate stage, we represented the client in her civil claim against the attorney. However, it settled on confidential terms. The client also filed a State Bar complaint against the attorney (*In re Bolanos* – a matter of public record). In the State Bar Court proceeding, the court granted the attorney's motion to exclude evidence of the fee compromise on the basis of the mediation privilege, but the compromise was admitted into evidence through other means. The State Bar Court recommended to the Supreme Court that the lawyer be suspended for a year. *Our point is that with evidence of the fee compromise excluded by the mediation privilege, the lawyer could have avoided all liability and punishment had he simply denied agreeing to compromise his fee during mediation.*

In another case that we prosecuted as a possible “test case,” the client accepted a settlement on the basis of the lawyer's assurance during mediation that he would be able to compromise \$200,000 in medical liens on the case to “next to nothing.” The lienholder, however, was covered by ERISA and therefore entitled to enforce complete reimbursement of its lien – a fact known to the lawyer well before the mediation – and, following the client's acceptance of the settlement, the lienholder refused to negotiate. The lawyer then engaged in a protracted battle with the lienholder, which delayed the client's receipt of greatly-needed settlement funds for more than a year and a half. Additionally, the lienholder stopped paying the medical bills of the still-treating client, and the client was then saddled with medical bills that went into collections and damaged his credit rating. We accepted that case on the basis that the lawyer made his “next to nothing” promise *knowing that he could not be bound by it*. Again, the case settled before any judicial decision could be made regarding the applicability of the mediation privilege. We remain open to taking other viable test cases if appropriate legislative action is not taken.

The following is a sampling of situations described to us by potential clients whose lawyers made negligent or intentional misrepresentations at mediation upon which the client relied in agreeing to settle:

- Lawyer claimed, without having any valid basis for doing so, that settlement proceeds would be non-taxable;

- Lawyer suddenly took the position during mediation that the client had a very weak case (sometimes caused by the attorney's own negligence which may or may not have been disclosed);
- Lawyer admitted that he sued the wrong defendant;
- Lawyer disclosed that he failed to preserve the client's multi-million dollar claim for loss of earning capacity;
- Lawyer revealed that he failed to timely retain and designate expert witnesses for trial;
- Client learned that there was a pending motion for summary judgment/ adjudication that the lawyer did not oppose in time and that, when granted, would eliminate most of the client's claims;
- Client discovered that lawyer did not have financial wherewithal to take the case through trial and pay expert witnesses;
- Client discovered that a critical cause of action was not timely raised and was now time-barred.

While some of these claims may be independently provable through court records and such, the client's reasons for settling are not. Once the mediation privilege excludes attorney-client communications, malpractice defense counsel can disparage any malpractice claim as simply one more example of "settle and sue." And, as noted above, the client then faces the onerous task of proving that the settlement was not "in the ballpark" of a reasonable, good-faith settlement.

The bottom line is that because of the mediation privilege, mediation has the potential of becoming an "ethics-free zone" – a black hole from which evidence of legal malpractice, fraud and other actionable conduct cannot escape. We believe that the mediation privilege is incongruous with an attorney's fiduciary duties because a lawyer seeking to take a case to mediation does not have to disclose that he or she can lie to or deceive a client with impunity. The disclosures and confidentiality agreements that are routinely handed out and signed at the start of a mediation are rarely read by the clients, and are complicated and highly legalistic documents that lawyers often do not explain to their clients.

Most clients trust their lawyers – they *should* trust their lawyers. However, the present application of the mediation privilege runs counter-intuitive to a client's expectations: a client believes she should be able to trust her lawyer but the mediation privilege says she cannot. The mediation privilege puts a conscientious attorney in the

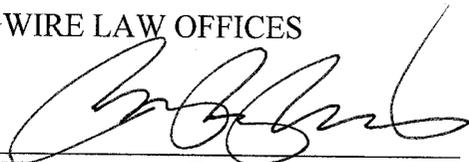
position of telling a client “you can’t trust me when we go in there.” An unscrupulous lawyer, knowledgeable about the privilege and the *Cassel* holding, can mislead, misrepresent, even lie, cheat and rob the client without fear of liability, redress or punishment. We know these are harsh words, but the reality and the irony here, and the truly abhorrent effect of this rule, is that the more unscrupulous the lawyer, the more the mediation privilege protects him or her. It is not a question of how great is the risk, because it is actually happening. In ignoring its effects, we are sacrificing fairness and justice for expediency.

We strongly encourage the Law Revision Committee to recommend an exception to the mediation privilege for attorney-client communications that may give rise to causes of action for attorney misconduct. Put another way, we believe the mediation privilege should remain intact and inviolate except for client claims based on malpractice, breach of fiduciary duty, or other actionable attorney wrongdoing. In this respect, we believe that California should align its position on mediation confidentiality along the lines of what is provided in The Uniform Mediation Act, approved in 2003, and now adopted or closely followed in approximately 16 states.

Thank you for your time and consideration.

Respectfully submitted,

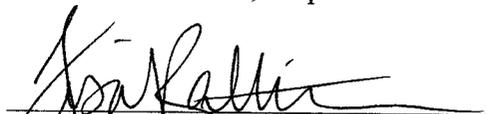
GWIRE LAW OFFICES



William Gwire, Esq.



Bruce M. Glassner, Esq.



Lisa Battista, Esq.

EMAIL FROM RON KELLY (7/24/15)

Re: Consensus on Amendment of Ev. Code 1120

Dear Ms. Gaal and Mr. Hebert,

This email is to follow up on my email to you dated May 1. That email provided you a copy of a new resolution pending before the Conference of California Bar Associations which seeks additional amendments to Evidence Code section 1120 beyond those which originally triggered your current Study K-402. I also referred to this pending CCBA resolution in my comments at the last Commission meeting.

That resolution, 09-03-2015, has generated significant opposition from family law mediators and collaborative law practitioners around the state. It has also however catalyzed a widespread consensus among family mediators on the need to amend 1120 to codify the Lappe decision referenced in Ms. Gaal's April 2, 2015 memo, and a further consensus on the wording of such an amendment.

This proposed amendment is provided below in case you or the Commission may find it useful in your current study. The wording has been reviewed and is supported by a large number of opinion leaders in the family law community, including Fern Topas Salka, Fred Glassman, Sarah Davis, Suzan Barrie Aiken, Nancy J. Foster, Catherine Conner, Jennifer Jackson, Dana Curtis, Frederick Hertz, Joseph P. Spirito, Jr., Jeffery S. Jacobson, Forrest S. Mosten, Olivia Sinaiko, Paula Lawhon, Mary Campbell, Kerry Wallis, Eileen Preville, Laura Goldin, B. Elaine Thompson, Shawn D. Skillin, Wendy S. Jones, Richard Zimmerman, Deborah Ewing, Leslie K. Hart, James M. Hallett, Jane K. Euler, Nancy L. Powers, Christopher M. Moore, Kenneth Harvey, and other family law practitioners opposed to the original 09-03-2015.

I'm copying Mr. Doyle on this email and would invite him to comment on the proposal as a potential model for resolving problems arising out of our current law.

Yours,
Ron Kelly, Mediator

** ** * ** **

Substitute Resolution 09-03-2015

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend California Evidence Code section 1120, to read as follows:

1120. Types of evidence not covered

1120. (a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) In family law actions, the declarations of disclosure required under sections 2104 and 2105 of the Family Code shall not be or become inadmissible or protected from disclosure solely by reason of their being prepared for the purpose of, in the course of, or pursuant to a mediation or a mediation consultation. Nothing in this chapter alters the requirements for declarations of disclosure in Family Code sections 2104 and 2105.

(c) This chapter does not limit any of the following:

- (1) The admissibility of an agreement to mediate a dispute.
- (2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.
- (3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

And further Resolved to recommend that the Legislature adopt the following Finding and Declaration of its intent:

The Legislature finds and declares that the intent of this legislation is to codify the rule of *Lappe v. Superior Court*, 232 Cal. App. 4th 774, 181 Cal. Rptr. 3d 510 (2014).

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Quick Note Re Lappe

The Lappe decision found that the required 2104 and 2105 declarations would have existed and been exchanged with or without mediation, were admissible and discoverable under section 1120, and “do not come within the ambit of Evidence Code section 1119 because they are not prepared for ‘the purpose of, in the course of, or pursuant to, a mediation’”.

RESOLUTION 09-03-2015

DIGEST

This resolution would create an exception to the mediation privilege, for communications between spouses or RDC that constitute a fraudulent breach of fiduciary duty.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend California Evidence Code section 1120, to read as follows:

§1120

(a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) In family law actions, evidence of a breach of the fiduciary duty by a spouse, as set forth in Sections 721 and 1100, that falls within the ambit of Section 3294 of the Civil Code shall be admissible and subject to discovery.

(c) This chapter does not limit any of the following:

- (1) The admissibility of an agreement to mediate a dispute.
- (2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.
- (3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: The Bar Association of San Francisco

STATEMENT OF REASONS:

The Problem: Family law litigants stand in a unique position in that they owe fiduciary duties to one another. While the mediation privilege promotes an important public policy, guarding against one spouse / RDP inducing the other to settle a dissolution case through the use of false, misleading, or fraudulent information is also an important public policy. This resolution seeks to balance these policies, by providing that when a breach of fiduciary duty that rises to a fraud (violation of Civil Code Section 3294) occurs in family law mediation, the spouse who was harmed by that can present evidence about the breach to the court.

Existing law totally bars admission of any communications made during mediation, even if blatant fraud occurred, and with no exceptions regardless of the circumstances or prejudice caused.

The Solution: This resolution adds an exception to the mediation privilege.

IMPACT STATEMENT

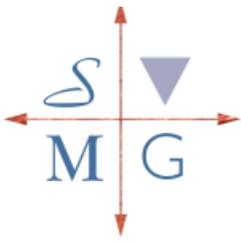
This proposed resolution does not affect any other law, statute or rule.

CURRENT OR PRIOR RELATED LEGISLATION

Not known.

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SILICON VALLEY MEDIATION GROUP

July 28, 2015

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Relationship Between Mediation Confidentiality and Attorney Malpractice (Study K-402)

Dear Commissioners:

Memorandum 2015-35 was an interesting synopsis of mediation confidentiality literature. After reflecting on the report, I wanted to share my thoughts on the interplay between confidentiality, process management, and professional misconduct and malpractice.

As the Commission notes in its memorandum, predictability is a very important concept—especially for mediation participants when attempting to understand the extent and limitations of confidentiality—and how the law applies under specific circumstances. For this reason, mediators who glibly say, "*What happens in mediation—stays in mediation.*" may be misleading participants. Their paraphrasing of this current Las Vegas marketing slogan does not define mediation, does not address exceptions, and certainly does not make clear that presently both attorney and mediator malpractice is protected.

The reference on page 4 to Prof. Ellen Deason's writings on "*predictability*" is noteworthy. As she points out, people need "*knowledge*" to make decisions. At present, few attorneys can recite the mediation confidentiality statute, let alone have explained it to their clients in any meaningful way.

In previous correspondence I have pointed out that that "*hand-ringers*" and "*naysayers*" have no evidence that creating exceptions to report or defend claims of professional misconduct and/or malpractice have weakened the process. There certainly is no evidence from any of the UMA states, and none from other states that have created their own exceptions to confidentiality. Specifically, Florida has the most comprehensive and time-tested statutes addressing mediation confidentiality and its exceptions. Here is state with over 6000 truly "*certified*" mediators (meaning they are trained, subscribe to a strict code of conduct, participate in continuing education, etc.): a state with over two decades of experience with exceptions for addressing professional malpractice, and one in which tens of thousands of cases have been mediated successfully. Yet this state has not experienced any of the problems that the speculators have proffered.

Creating exceptions for both attorney and mediator misconduct and/or malpractice is not complicated. There are plenty of examples from a number of states, whose rules could be used as a template. The real question is "*to whom*" is the malpractice reported. Some say use an *in camera* process; however this procedure takes time and is expensive. Bar associations are in an ideal position to deal with claims against attorneys. For mediators, who are not attorneys, the courts are presently the only option. Creating a true credentialing entity would be superior. Again the Florida rules provide guidance for how to handle professional misconduct and/or malpractice.

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EX 12

The above suggestion provides an additional benefit: with "*credentialed*" mediators—the public would have more confidence in the process. Making mediation a true profession, and not continuing as a cottage industry, would mean that mediators would actually have to take training, subscribe to a code of ethics, understand the statutes that relate to the practice, acquire continuing education, and be of good moral character. At present, anyone can wake up in California and declare himself or herself a mediator—no doubt this suggestion will raise howls from "*hallelujah*" mediators.¹

Moreover, this suggestion would eliminate misleading advertising that some mediation trainers use to market their courses, saying that their courses are "*certified*" or that attendees are "*certified*" mediators. To my knowledge, there is no mediation credentialing entity in California. Dog groomers are regulated and held to higher standards than mediators.

Professor Kirtley's comments that are located on page 8 say it all: "*(t)he mediation privilege should not provide a safe haven for participant wrongdoing or injustice.*" On the other hand, Scott Hughes' comments on page 12 are typical of those made by individuals who are speculating and have no empirical evidence upon which to base their comments. Nancy Welsh is another credible voice raising significant concerns regarding the present California statutes and court decisions regarding confidentiality (page 17). As others have said, creating exceptions to confidentiality to protect against abuse due to professional misconduct and malpractice, guards against abuse of and within the process.

When is anyone going to focus on the elephant in the room: "*What will happen to mediation when the public becomes aware that court decisions have protected malpractice?*" This question raises another significant issue, "*Who has the legal or ethical duty to inform the participants that both attorney and mediator malpractice is protected?*" Is it the mediator, manager of the process, or the attorney, a client's legal advisor?

Moving on to the speculation that if exceptions are created to the confidentiality statute, then there will be a flood of requests to rescind settlements. What the empirical evidence actually shows is that there is no flood. What the data identifies is that most requests to set aside a settlement are based on claims by the participants that they were pressured or coerced, and the mediator is often mentioned as the culprit. There are more of these claims associated with divorce and custody cases, often where parties are not represented by counsel.

One may hear these same mediators saying something like, "*I mediated 100 cases, and I settled 99 of them.*" This sounds like the mediator has a "*dog in the hunt*", and the dog's name is "*Ego*". How does this situation demonstrate mediator impartiality? A mediator, who is more interested in claiming bragging rights as the person who settled the case, is more likely to not remain impartial. Impartiality is as much a cornerstone of mediation as confidentiality. When settling the case, at all costs, trumps impartially managing the process, then it is time to create an exception to confidentiality.

Mediator impartiality extends to the discussion of determining "*good faith*". Again, it is a straightforward process: when a claim of "*good faith*" surfaces, all anyone has to do is turn in the attendance sheet. This demonstrates to the court who was at the mediation. Asking the mediator or

¹ *Beware the "Hallelujah" Mediator*, Nancy Neal Yeend, Plaintiff Magazine, September, 2012.

anyone else to determine for the court, who did or did not act in "*good faith*" is exceedingly difficult. In many instances the conclusions would be based on speculation and innuendo, which in turn would mean that the court would make a determination based on incomplete evidence. John Lande's thoughts, presented on page 27, represent a realistic assessment of the entire "*good faith*" discussion. One fascinating aspect of the topic is that few ever define "*good faith*". Before a rule is credible, the terms need to be clearly defined.

The topic addressing creating an exception for criminal activity was briefly discussed in the memorandum, and the short solution is similar to that for the earlier comments regarding exceptions for professional misconduct and malpractice. Criminal activity (past, present or future), abuse (children and elders) and neglect are not topics that should be concealed by the umbrella of mediation confidentiality.

Perhaps one needs to wonder more about Professor Laflin's comments (page 38) regarding a participant's understanding of the process, confidentiality and its exceptions, which raises the more significant question of informed consent. If people are signing confidentiality agreements when they participate in mediation, and yet they have no understanding of what it means or the implications, how can this be informed consent? There is no legitimate reason for a fundamental element relating to the ability to contract to be compromised in the name of confidentiality.

One of the final topics addressed in the memorandum was associated with power imbalances, and permitting an attorney or support person to attend the mediation. Phyllis Bernard (page 40) makes a strong case for self-represented litigants to have support. There is a significant body of research that came out in the 1980s and 1990s showing how unbalanced settlements were more predominate for women, minorities and victims of abuse.

ADA cases mediated for the Justice Department provide a "*reasonable*" period of time before the settlement becomes binding. Many jurisdictions and various contracts provide "*72-hour kick-out*" clauses. Mediated settlements enjoy a significantly high compliance rate. When people question the settlements that they have signed, it typically is based on intimidation, coercion or just being rushed. Skilled mediators will schedule a "*back-up*" mediation session, so in the event someone has been pressured, there is a time and place designated to re-negotiate. Competent mediators possess the skills to effectively manage the process in a way that prevents many of these issues from ever arising.

Due to previously scheduled commitments, I am unable to attend the August 7th meeting to answer any questions, or to provide additional information. I do look forward to reading the results from the Commission's next meeting.

Sincerely,

Nancy

Nancy Neal Yeend

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